UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------------------------------X

DAVID NORKIN,

Plaintiff, Case No. 05 CV 9137 (DC)

-against-

DLA PIPER RUDNICK GRAY CARY, LLP,

Defendant.

----------------------------------X

PLAINTIFF'S MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION TO TRANSFER

This memorandum is submitted in opposition to the motion by defendant to transfer this malpractice action, originally filed in Supreme Court, New York County, to the District of Connecticut. The motion should be denied.

This case has nothing to do with Connecticut and everything to do with New York:

-- the plaintiff is a resident of New York;

-- the defendant Piper is a national law firm, has an office in New York, and all of the attorneys at Piper with whom the plaintiff consulted worked in the New York office;

-- the events giving rise to the action occurred in New York;

-- the case is governed by New York law and involves the standard of care applicable to attorneys practicing in New York; and

Dockets.Justia.com

-- the attorneys for plaintiff are in New York and the attorneys for defendant are in New York (and Maryland).

In short, the overwhelming contacts are with New York, not Connecticut; there would be no advantage of convenience to the parties, the witnesses or the attorneys if the cases were transferred.

The defendant claim that the "locus of operative facts shifted from New York to Connecticut when the Britestarr bankruptcy was transferred to Connecticut in 2002, when Britestarr filed its suit against Piper in Connecticut, and when Britestarr moved its headquarters to Connecticut." (Defendant's Memorandum, p. 8). Defendant does not explain how this can be, in view of the fact that the gravamen of plaintiff's complaint was that defendant advised plaintiff to resign as President of Britestarr before Britestarr filed for bankruptcy, and certainly before the bankruptcy case was transferred to Connecticut.

Defendant identifies two individuals it claims are witnesses who reside in Connecticut. No person with knowledge of the facts has supported this claim with an affidavit. One witness, Matthew Beatman, Mr. Norkin's personal bankruptcy attorney, is alleged to have been at meetings at which alternatives to Britestarr's bankruptcy was discussed; Mr. Norkin has no recollection that he was ever at such meetings. The other witness is Ronald Chorches, Mr. Norkin's trustee. Mr. Chorches was aware prior to the filing of this action that it would be filed in New York and never objected.

Defendant claims that transfer to the District of Connecticut is appropriate because both Mr. Norkin's and Britestarr's bankruptcy cases are in the Bankruptcy Court in Connecticut. However, it is unlikely that this case will be in the Bankruptcy Court; it certainly will not be tried there. Mr. Norkin is entitled to and would seek a jury trial of the malpractice case, and it will therefore need to be tried in the District Court, not the Bankruptcy Court.

While it is true that the Britestarr malpractice action is in the District Court in Connecticut, it is not true that transferring this case will in any way conserve judicial efforts. We are advised by counsel for Britestarr that discovery in that case was concluded in 2004, and that, indeed, summary judgment motions have been fully briefed and are sub judice. By contrast, discovery in the case has not commenced, and defendant has not even filed an Answer. Moreover, defendant has not identified any legal or factual issues which are common to the two cases which would give the Connecticut court an advantage over this court in handling the case.

Defendant also claims that the "interests of justice" require a transfer because "these two separate lawsuits and their irreconcilable claims simply cannot be allowed to proceed in separate forums..." (Defendant's Memorandum, p. 12). Defendant's Memorandum, however, does not explain why Britestarr's claims that Piper induced Mr. Norkin to breach his fiduciary duty to Britestarr (Defendant's Memorandum, p. 11) is inconsistent with Mr. Norkin's claim that Piper gave him bad advice as well. Nor does Britestarr's claim that Piper's "loyalty lay...not with Britestarr but with Norkin" (id.) conflict with Mr. Norkin's claim -- which Piper disputes -- that Piper represented him individually. Indeed, the two claims are remarkably consistent. The fact that Piper also breached its fiduciary duty to Mr. Norkin in favor of an unrelated client, as alleged in the Complaint, is not inconsistent with the claim that Piper breached its duty to Britestarr.

It is ironic that Piper, itself, when it represented Britestarr Homes, Inc. ("Britestarr") opposed the transfer of Britestarr's malpractice suit to Connecticut from New York. (See Annex A hereto, Memorandum filed by Piper in June 2002 on behalf of Britestarr in response to a motion to transfer by one of Britestarr's creditors). This case presents a much less compelling case for transfer. In Britestarr, the company had moved its office to Connecticut, and Britestarr's most substantial creditor was the moving party. Here, by contrast, no party is a resident in Connecticut, and neither the debtor nor any creditor is seeking a transfer. As Piper claimed in opposing the transfer motion, the

Petitioner had the "right to choose the appropriate forum." (Annex A, p. 1)

Conclusion

Defendant's motion to transfer this action to the District of Connecticut should be denied.

Dated: New York, New York
February 9, 2006

Respectfully submitted,

Litman, Asche & Gioiella, LLP

By:________________________________
Richard M. Asche (RMA-7081)

45 Broadway - 30th Floor
New York, New York 10006
(212) 809-4500